Loyalty vs. Sovereignty

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The German Constitutional Court's *Weiss* ruling has led to a major debate as to whether a national supreme court may disregard ECJ case law, asserting that the ECJ had acted *ultra vires*. Similar debates have existed for quite some time in the EFTA pillar of the EEA. In these discussions, the question has been whether national courts can disregard the judgments of the EFTA Court or the ECJ on grounds of alleged national interest. EEA law is more flexible than EU law and to a greater extent based on general principles. Since 1995, the EFTA pillar has consisted of Iceland, Liechtenstein and Norway. A relatively small but powerful group of lawyers in the Norwegian administration (led by the Government Attorney), orthodox dualist professors and judges loyal to the government has used Norway's dominant position to attempt to redefine EEA law. One of the most effective strategies is the suppression of the notion of loyalty or good faith and its replacement by a strategy of creating "room for manoeuvre" ("RFM") for Norway.

Article 3 EEA provides, *inter alia*, that the EEA Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. The Contracting Paries shall furthermore abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. As the EFTA Court held in *Fokus Bank*, the provision mirrors Article 4(3) TEU. A recent attempt by the Norwegian Government Attorney *I.N. v Russian Federation* to convince the ECJ to define the EEA law duty of loyalty more narrowly than in EU law in order to create RFM with regard to the interpretation of the Citizens' Rights Directive failed miserably . Advocate General *Evgeni Tanchev* explicitly rejected this contention. The ECJ's Grand Chamber followed without mentioning the Government Attorney's submissions.

When the EEA Agreement was negotiated in the early 1990s, the ECJ had already rendered some 150 judgments on loyalty. Under the principle of homogeneity (Article 6 EEA) these rulings were, as a matter of principle, relevant for the interpretation of Article 3 EEA. Admittedly, the objectives of the EEA are more modest than those of the EU Treaties. Nevertheless, both the EU and EEA aim at establishing a single market. Article 3 also addresses national administrations and courts making those courts (also) EEA courts.

In applying Article 3 EEA, there is a discrepancy between the approach of the drafters of the EEA Agreement and the EFTA Court on the one hand and the policies of national administrations and courts on the other. While Article 3 EEA occupies an important place in the EFTA Court's case law, it is hardly acknowledged by national authorities and courts in the EFTA pillar. Government representatives tend to avoid any reference to Article 3 EEA in proceedings before the EFTA Court and before the national courts.

From the outset, the EFTA Court has based its judgments in infringement proceedings *inter alia* on Article 3 EEA. Most importantly, the recognition of EEA State liability in the landmark case of *Sveinbjörnsdóttir* and of the principle of conform interpretation in *Criminal proceedings against A* were, among others, founded on the loyalty requirement. The principle of loyalty or good faith moreover plays a crucial role in the preliminary reference procedure. Article 34 EFTA Surveillance Authority/EFTA Court Agreement does not oblige national courts of last instance to refer questions of EEA law to the EFTA Court. Orthodox dualists in Iceland and Norway therefore contend that those courts are completely free to make a reference. Even the systematic refusal is assumed to remain without consequences under EEA law. The Norwegian Government Attorney, for its part, has from the outset urged national courts not to refer cases to the EFTA Court where the EFTA Surveillance Authority and the Commission are participating in the proceedings. For its part, the Norwegian Supreme Court refrained from making any references between 2002 and 2015 despite dealing with some 50 cases involving EEA law (here). What the former French judge of the ECtHR, Louis-Edmond Pettiti wrote in 1985 in a general international law context largely applies to the Norwegian Government Attorney: "The nature of decisions which can be referred by national courts to international jurisdictions are commonly delicate and sensitive ones […] and thus states may be tempted to put pressure on local national courts to avoid such references. This, in turn, would logically neutralize the effectiveness of international courts by starving them of work". There has never been anything like this in Iceland or Liechtenstein. Liechtenstein is a monist country and in Iceland, orthodox dualism has over time largely been replaced by a pragmatic view.

The second peculiarity of the EFTA pillar's preliminary reference procedure is that Article 34 SCA refers to the pronouncements of the EFTA Court as "advisory opinions". Orthodox dualists, who also look at this provision in isolation, conclude simply that the EFTA Court's decisions are not binding. In the first *Finanger* case, the Supreme Court of Norway coined the sentence that the opinions of the EFTA Court are to be given „preeminent weight" ("*vesentlig vekt"*). Subsequently, however, it became clear that this is a relatively empty formula. The Supreme Court itself decides whether an opinion is of such weight. The Frostating Court of Appeal thus had little difficulty to disregard the EFTA Court's landmark *Fosen* ruling of 31 October 2017 on the standard of liability in public procurement law (here) without carrying out any meaningful test.

The Norwegian Supreme Court has itself refused to follow the EFTA Court in important cases. Examples include *Pedicel* (advertisement ban for alcoholic beverages), *Gaming Machines* (State gambling monopoly) or *STX* (Posting of workers). The Supreme Court's attitude did not escape the EFTA Court, both with regard to the question of whether it should refer and to the legal nature of the EFTA Court's opinions. In 2013, the EFTA Court held in *Irish Bank* that in deciding whether to refer, national courts of last resort must bear in mind their duty of loyalty and the principle of reciprocity. Indeed, citizens and economic operators from the EFTA pillar have free access to the ECJ. After the Supreme Court refused to follow the EFTA Court in *STX* some five months later, the EFTA Court doubled down and underlined in *Jonsson* in 2013 the need that unclear questions of EEA law be

referred to it. The EFTA Court observed that: “Thereby unnecessary mistakes in the interpretation and application of EEA law are avoided and the coherence and reciprocity in relation to rights of EEA citizens, including EFTA nationals, in the EU are ensured”.

At this point, the special function of the EEA law duty of loyalty or good faith law becomes particularly clear: in the EFTA pillar, the EEA Agreement leaves the defence of subjective rights largely to national authorities and courts. The duty of loyalty is intended to ensure that legal protection in both pillars is roughly equivalent. According to leading authors such as *Christian Franklin*, it is thus even more important in the EEA/EFTA context than in the EU context. Former EFTA Surveillance Authority President *Knut Almestad* wrote some years ago: “Good faith is the keystone which supports the EEA edifice, without which the construction might crumble”. In individual cases, therefore, there may well be an obligation to refer. Moreover, deviations from an EFTA Court advisory opinion must be very well reasoned.

Finally, the importance of the loyalty requirement for national administrations must be underlined. *Mads Andenæs* has stated that in Norway, a misconceived principle of sovereignty has overshadowed the duty of loyalty. Indeed, the Norwegian Government Attorney in particular is guilty of disregarding the loyalty requirement. Organs of the state are obliged to present EEA and EU law as objectively as possible in their pleadings before national courts. Deliberately omitting important precedents or selectively citing literature or other materials is impermissible. The same goes for efforts to oppose systematically references to the EFTA Court. Other unacceptable strategies include attempts to persuade national courts to disregard the EFTA Court’s ruling, to re-refer questions which have already been decided (so-called judicial revisionism), and to ask the ECJ to create a judicial conflict with the EFTA Court in a later parallel case.

It is also incompatible with Article 3 EEA for administrative bodies to urge national courts to render pro-state judgments in fundamental freedoms and fundamental rights cases based on a misinterpretation of the proportionality principle. In Norway, the claim is particularly popular that discriminations or restrictions may be justified by way of a “moderate intensity test” or a „light review”. In Norwegian literature, this has rightly been criticised by *Tor-Inge Harbo*. Former Norwegian Supreme Court Justice, now a Judge of the ECtHR, *Arnfinn Bårdsen* observed that there is “still some way to go as to give full effect of that (sc. the proportionality) principle in the Norwegian Supreme Court”. Under EEA law (as under EU law), justification is only possible if the measure in question is pursuing a legitimate goal, is suitable, consistent, necessary and, as the case may be, proportionate *stricto sensu*. The burden of proof is thereby on the State.

To come back to *Weiss*, the disloyalties of parts of the Norwegian administration and judiciary are not about elementary issues such as stabilising the Eurozone, but about defending privileges and vested interests. It is, for example, more than questionable whether, in view of its marketing activities, the Norwegian state monopoly in the gambling sector is in line with the case law of the EFTA Court and the ECJ. The

same applies to the advertising ban on alcoholic beverages, which naturally favours those already on the market and is thus discriminatory.
